Supreme Court, U. S.
FILED
DEC 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-887

R. R. SURLES, OFFICER, STATE HIGHWAY PATROL,
PETITIONER,

versus

WILLIAM JOHN WIRTH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL R. McLEOD,
Attorney General,
State of South Carolina,

EMMET H. CLAIR,
Senior Assistant Attorney General,
Of Counsel,

RICHARD D. BYBEE,
Staff Attorney,
Of Counsel,
Post Office Box 11549,
Columbia, South Carolina 29211,
Attorneys for Petitioner.

December 19, 1977.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statutory Provisions Involved	3
Statement of the Case	5
Reasons for Granting the Writ:	
I. The decision of the Court of Appeals for the Fourth Circuit is in conflict with the principles of several decisions of the United States Supreme Court and is in direct conflict with the holding of at least one Supreme Court decision	6
II. The Court of Appeals decision for the Fourth Circuit conflicts with principles established by the Court of Appeals of the Fifth, Sixth, and Seventh Circuits	9
III. The decision of the Court of Appeals for the Fourth Circuit is in direct conflict with various decisions of the district courts and the issues to be resolved are important to the public at large	11
IV. The decision of the Court of Appeals for the Fourth Circuit is erroneous	12
Conclusion	15

CITATIONS

Cases:	Page
Alexander v. Emerson, 489 F. 2d 285 (5th Cir. 1973)	10, 13
Avco Corp. v. Aero Lodge No. 735, 390 US 557, 20 L. Ed. 2d 126, 88 S. Ct. 1235 (1968)	11
Biddinger v. Commissioner of Police, 245 US 128, 62 L. Ed. 193, 38 S. Ct. 41 (1917)	6, 12
Crawford v. Lydick, 179 F. Supp. 211 (W. D. Mich. 1959, Aff'd 280 F. 2d 426 (6th Cir. 1960)	10, 13
Croy v. Skinner, 470 F. Supp. 117 (D. C. Ga. 1976)	14
Douglas v. Jeannette, 319 US 157, 87 L. Ed. 1324, 63 S. Ct. 877 (1443)	8
Frisbie v. Collins, 342 US 519, 96 L. Ed. 541, 72 S. Ct. 509 (1952)	13
Hamilton v. Chaffin, 506 F. 2d 904 (5th Cir. 1975)	14
Hines v. Guthrie, 341 F. Supp. 594 (E. D. Va. 1972)	11, 13
Johnson v. Buie, 312 F. Supp. 1349 (W. D. Mo. 1970)	11, 13
Ker v. Illinois, 119 US 436, 30 L. Ed. 421, 7 S. Ct. 225 (1886)	13
Land v. Dollar, 330 US 731, 91 L. Ed. 1209, 67 S. Ct. 62 (1947)	2
Pettibone v. Nichols, 203 US 192, 51 L. Ed. 148, 27 S. Ct. 111 (1906)	7, 13
Ouzts v. Maryland National Ins. Co., 470 F. 2d 790, reh. 505 F. 2d 547 (9th Cir. 1972)	14

CITATIONS—Continued

Cases:	PAGE
Saunders v. Cahill, 359 F. Supp. 79 (D. C. Ill. 1973)	14
Smith v. State of Idaho, 373 F. 2d 149 (9th Cir. 1967)	10
Taylor v. Nichols, 409 F. Supp. 927 (D. C. Kan. 1976)	14
United States v. Constantine, 296 US 287, 80 L. Ed. 233, 56 S. Ct. 223 (1935)	11
United States v. General Motors Corp., 323 US 373, 89 L. Ed. 311, 65 S. Ct. 357 (1945)	2
United States v. Lohman, 228 F. 2d 824 (7th Cir. 1955)	9, 10
Constitutional Provisions:	
United States Constitution: Article IV, Section 2, Clause 2	2, 3, 6, 9, 12
Statutes:	
Title 18 USC § 3182	2, 3, 6, 9, 12
Title 28 USC § 1254(1)	2
Title 42 USC § 1983	passim
Georgia Code Annotated § 44-411	2, 4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

R. R. SURLES, OFFICER, STATE HIGHWAY PATROL,
PETITIONER,

versus

WILLIAM JOHN WIRTH, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on September 22, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on September 22, 1977. This Court's jurisdiction is invoked under 28 USC § 1254(1). Although the Court of Appeals has ordered the case remanded to the District Court and the judgment is not final the petitioner respectfully submits that it is appropriate for review because it involves an issue which is fundamental to the further conduct of the case. The validity of the decision of the court below depends on the scope and meaning of Article IV, Section 2, Clause 2 of the United States Constitution and the federal laws enacted thereunder. See *Land v. Dollar*, 330 U. S. 931, 91 L. Ed. 1209, 1214, 67 S. Ct. 62; *United States v. General Motors Corp.*, 323 U. S. 373, 377, 89 L. Ed. 311, 318, 65 S. Ct. 357.

QUESTIONS PRESENTED

I

Whether Article IV, Section 2, Clause 2 of the United States Constitution secures to the respondent any rights, privileges or immunities which are actionable under 42 USC § 1983 against the petitioner Surles?

II

Whether 18 USC § 3182 secures to the respondent any rights, privileges or immunities which are actionable under 42 USC § 1983 against the petitioner Surles?

III

Whether Georgia Code Annotated § 44-411 secures to the respondent any rights, privileges or immunities which are actionable under 42 USC § 1983 against the petitioner Surles?

IV

Whether a cause of action arises under 42 USC § 1983 against the petitioner Surles where the respondent has allegedly been removed from a state without extradition proceedings and then pleads guilty in the demanding state?

V

Whether the petitioner is the proper defendant in an action pursuant to 42 USC § 1983 for arresting and removing the respondent from the State of Georgia without extradition proceedings?

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 2, Clause 2 of the United States Constitution provides:

> "A person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

STATUTORY PROVISIONS INVOLVED

18 USC § 3182 provides:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority

making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

42 USC § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 44-411 of Georgia Code Annotated provides:

"No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this State, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of *habeas corpus*. When such writ is applied for, notice therefor, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state."

STATEMENT OF THE CASE

The petitioner is R. R. Surles of the South Carolina State Highway Patrol. In the district court he was the defendant and in the Court of Appeals, he was the appellee. He was sued by the respondent, William John Wirth, in a civil rights action for damages pursuant to 42 USC § 1983 thereby raising federal questions of law. The respondent alleged that he was detained in Georgia by Georgia law enforcement authorities as a result of a radio call from South Carolina authorities and that he was taken into custody by the petitioner Surles and returned to South Carolina without extradition proceedings. The respondent subsequently pled guilty to the charge of armed robbery and was sentenced. The district court, *sua sponte,* in an order filed April 1, 1976, dismissed the complaint holding that the purpose of the extradition statutes was to benefit the states, rather than an accused, and that an action under 42 USC § 1983 could not be maintained against the petitioner for forcibly taking the respondent into custody and bringing him into South Carolina without extradition proceedings.

The United States Court of Appeals for the Fourth Circuit in an opinion decided on September 22, 1977, reversed the district court decision and remanded the case for further proceedings.

In this Court the petitioner seeks review of the Court of Appeals determination that the respondent possessed rights, privileges or immunities secured to him by the Constitution and laws of the United States which are actionable under 42 USC § 1983 against the petitioner. The petitioner contends that the arrest and removal of the respondent from Georgia to South Carolina does not create a cause of action pursuant to 42 USC § 1983. The petitioner also seeks review of the Court of Appeals decision that violations of

the laws of Georgia give rise to a civil rights action pursuant to 42 USC § 1983.

REASONS FOR GRANTING THE WRIT

I. The decision of the Court of Appeals for the Fourth Circuit is in conflict with the principles of several decisions of the United States Supreme Court and is in direct conflict with the holding of at least one Supreme Court decision.

The Court of Appeals in this case has found that Article IV, Section 2, Clause 2 and 18 USC § 3182 have conferred upon fugitives substantive rights which are actionable under 42 USC § 1983. This decision is in conflict with the principles enunciated by the Supreme Court in *Biddinger v. Commissioner of Police,* 245 U. S. 128, 62 L. Ed. 193, 38 S. Ct. 41. The question in that case was whether an order remanding the accused into custody to be conveyed to the State of Illinois was in violation of the rights secured to him by the Federal Constitution Article IV, Section 2, Clause 2 and 18 USC § 3182. (Formerly United States Revised Statutes § 5278.) This Court stated, in finding no violation and in describing the purpose of this constitutional provision that:

> The language was not used to express the law of extradition as usually prevailing among independent nations, but to provide a summary executive proceeding by the use of which the closely associated States of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one state an asylum against the processes of justice of another . . . .
>
> . . . Courts have been free to give this meaning to the Constitution and statutes because in delivering up an accused person to the authorities of a sister state, they are not sending him for trial to an alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution, but in the manner provided by the state against the laws of which it is charged that he has offended.

The purpose of this constitutional provision and the statutes enacted pursuant to it is to grant to the state a means of erasing the boundaries of the states so that each state may bring to speedy trial offenders against its laws. It confers no rights upon the fugitives being extradited.

The finding of the Court of Appeals that a cause of action pursuant to 42 USC § 1983 exists where one alleges that he has been illegally extradited is in direct conflict with the Supreme Court case of *Pettibone v. Nichols,* 203 U. S. 192, 51 L. Ed. 148, 27 S. Ct. 111. The petitioner in that case contended that his arrest and deportation from Colorado was by fraud and so arranged as to deprive him of an opportunity to prove, before the governor of that state, that he was not a fugitive from justice. This Court, in assuming that the alleged facts were true, found that there was no violation of the Constitution or laws of the United States by such action. The Court stated:

> No obligation was imposed **by the Constitution or laws of the United States** upon the agent of Idaho to so time the arrest of the petitioner, and so conduct his deportation from Colorado, as to afford him a convenient opportunity, before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice, and, as such, liable under the act of Congress, to be conveyed to Idaho for trial there. In England in the cases of one arrested for the purpose of deporting him to another country, it is provided that there shall be no surrender of the accused to the demanding country until after the expiration of a specified time from the arrest, during which period the prisoner has an opportunity to institute *habeas corpus* proceedings. Extradition Act of 1870, 33 and 34 Viet. Chap. 52, § 11; 2 Butler, Treaty-Making Powers, § 436; 1 Moores, Extradition 741, 742. There is no similar act

> of Congress in respect of a person arrested in one of the states of the Union as a fugitive from the justice of another state. The speediness therefore, with which the Idaho agent removed the accused from Colorado, cannot be urged as a violation of a constitutional right, and constitutes no legal reason for discharging him from the custody of the state of Idaho. [Emphasis present in text.]

The Court of Appeals also found that a violation of Georgia Code Ann. § 44-411 gave rise to a cause of action under 42 USC § 1983. This holding is in conflict with the Supreme Court case of *Douglas v. Jeannette,* 319 U. S. 157, 87 L. Ed. 1324, 1328, 63 S. Ct. 877 which stands for the principle that to have a cause of action under the Civil Rights Act, one must allege the deprivation of rights created by the Constitution or federal law. This Court stated:

> Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it appears that the abridgement of the right is effected under color of a state statute or ordinance.

Clearly one must allege the deprivation of a Constitutional or federal right and a violation of state law is insufficient.

The petitioner respectfully submits that the writ requested should be issued to resolve the conflicts of the Court of Appeals' decision and the various decisions of the United States Supreme Court cited above.

II. The Court of Appeals for the Fourth Circuit's decision conflicts with principles established by the Courts of Appeal for the Fifth, Sixth, and Seventh Circuits.

The decision by the Court of Appeals that one's federally protected rights are infringed by an illegal extradition assumes that there are absolute limitations on a state's power to arrange for a return of a fugitive. Although the Court of Appeals does not articulate exactly what "right" of the respondent has been infringed upon by allegations of an illegal extradition, its decision rests on the principle that a fugitive's federally protected rights could be violated if one does not follow Article IV, Section 2, Clause 2 and 18 USC § 3182, *i.e.,* one can release a fugitive only upon request of a governor of a demanding state. This position is in conflict with the Seventh Circuit position expressed in the case of *United States v. Lohman,* 228 F. 2d 824 (7th Cir. 1955). At issue in that case was a compact between two states which authorized the officials of one State to permit a person on probation or parole to reside in another State and authorized the officers of a sending state to enter the receiving state for the purpose of apprehension and retaking any person thus released on probation or parole. The petitioner in that case contended that the compact was unconstitutional because it violated Article IV, Section 2, Clause 2 of the Federal Constitution and Title 18 USC § 3182. The court in discussing that contention said:

> The contention appears to be that the constitutional provision on extradition places an absolute limitation upon the power of the states to provide or arrange for the return of a person to a state from which such person is a fugitive from justice. We think there is little, if any, merit in this contention. In the first place, Congress evidently thought the Constitution placed no such inhibition upon the authority of the state to make agreements concerning persons on probation or parole

> because it expressly authorized the state to enter into such compacts. Title 4 USCA § 111. Moreover and perhaps more important is the fact that the constitutionality of similar compacts between other states has been sustained . . . .

In addition to conflicting with the principle stated in *U. S. v. Lohman, supra,* the decision of the Court of Appeals also conflicts with the principles established in *Alexander v. Emerson,* 489 F. 2d 255 (5th Cir. 1973). In that situation a prisoner was held to be unable to maintain a civil rights action for damages based upon alleged constitutional infirmities of his arrest, search of his apartment and seizure of property which was introduced at a trial which resulted in his conviction. A similar situation is presented in this case. An individual, who has pled guilty to the charge for which he was arrested and extradicted for, now seeks money damages for the alleged violation of an extradition proceeding which would have made only two inquiries; the first being whether the accused had been charged with a crime under the laws of a demanding state and second whether the person demanded was a fugitive. *Smith v. State of Idaho,* 373 F. 2d 149 (9th Cir. 1961). Both of these inquiries are irrelevant and no injury or prejudice to the respondent can be claimed in light of his subsequent guilty plea.

Finally, the Court of Appeals' decision appears to conflict with the Sixth Circuits' decision in *Crawford v. Lydick,* 179 F. Supp. 211 (W. D. Mich. 1959), aff'd 280 F. 2d 426 (6th Cir. 1960). The court there found that the plaintiff's civil rights cause of action which contended that his jury trial, conviction and sentences were illegal because of his allegedly unlawful arrest in Ohio and removal to Michigan was "wholly without merit." The court found that the plaintiff had failed to allege any facts which showed that the defendants had conspired to deprive him of any rights,

privileges or immunities secured by the Constitution and laws of the United States.

In light of these conflicting decisions of the various Courts of Appeal (*Avco Corporation v. Aero Lodge No. 735,* 390 U. S. 557, 20 L. Ed. 2d 126, 129, 88 S. Ct. 1235) and in furtherance of the Supreme Court's goals of uniformity of judgments the petitioner respectfully requests that the writ be issued.

III. The decision of the Court of Appeals for the Fourth Circuit is in direct conflict with various decisions of the District Courts and the issues to be resolved are important to the public at large.

The petitioner respectfully acknowledges that it is unusual for this Court to grant certiorari on the grounds of a conflict between a court of appeals decision and a district court decision. The petitioner submits however that this situation is akin to the situation in *United States v. Constantine,* 296 U. S. 287, 80 L. Ed. 233, 236, 56 S. Ct. 223, because not only does a conflict exist but the questions to be resolved are important to the public at large. The elimination of frivolous suits of this nature will reduce the burden on the overcrowded federal courts and will relieve many state and local public officials of the time and expense of jury trials and possible personal liability in damages.

The cases of *Hines v. Guthrie,* 342 F. Supp. 594 (E. D. Va. 1972) and *Johnson v. Buie,* 312 F. Supp. 1349 (W. D. Mo. 1970) both stand for the proposition that one cannot maintain an action for damages under the Federal Civil Rights Act for an allegedly illegal extradition because the constitutional provision and the statutes enacted thereunder were created to benefit the states and not to give substantive rights to fugitives. These cases also stand for the proposition that one who has been convicted of a charged offense in the demanding state is not entitled to maintain

an action for damages under 42 U.S.C. 1983 against those who allegedly forcibly abducted him from an asylum state without proper extradition proceedings. Finally *Johnson v. Buie, supra,* points out that the fugitive may have an action under state law but that in most cases such an action would appear to be against the appropriate officers of the *asylum state.* (Emphasis added.)

The petitioner respectfully submits that these conflicts need to be uniformly resolved and requests that the requested writ issue.

IV. The decision of the Court of Appeals for the Fourth Circuit is erroneous.

The Federal Civil Rights Act, 42 U. S. C. § 1983, requires that before anyone can bring an action thereunder, certain specific rights, secured to a citizen by the Constitution or federal laws must have been violated. It is the petitioner's position that the respondent does not have a cause of action in this case because he has not alleged the denial of any federally protected right within the meaning of the Federal Civil Rights Act. Respondent's contention that the procedures of Article IV, Section 2, Clause 2 of the United States Constitution and the procedures of the Federal Extradition Act, 18 U. S. C. § 3182 have not been complied with does not establish that a federal right has been infringed upon.

The purpose of Article IV, Section 2, Cl. 2 of the United States Constitution, and 18 U. S. C. § 3182 was to facilitate the discovery and bringing to speedy trial of fugitives from justice by the states. These provisions were not intended to safeguard the rights of the fugitive. *Biddinger v. Commissioner of Police, supra.* Upon this reasoning several district courts have held that one who has been convicted of an offense in the convicting state cannot maintain an action for damages under the Federal Civil Rights

Act against those who allegedly forcibly abducted him from an asylum state. *Hines v. Guthrie, supra; Johnson v. Buie, supra.* For these reasons it has been held that a state may constitutionally try a person charged with a crime within its jurisdiction, even though that person was forcibly abducted from an asylum state, without a warrant and without extradition proceedings. *Frisbie v. Collins,* 342 U. S. 519, 96 L. Ed. 541, 72 S. Ct. 509 (1952) rev'g. 189 F. 2d 464 (6th Cir. 1951); *Ker v. Illinois,* 119 U. S. 436, 30 L. Ed. 421, 7 S. Ct. 225 (1886); *Crawford v. Lydick,* 179 F. Supp. 211 (W. D. Mich. 1959) affm'd., 280 F. 2d 426 (6th Cir. 1960) cert. den. 364 U. S. 849, 5 L. Ed. 2d 72, 81 S. Ct. 93. *Pettibone v. Nichols, supra,* stated that the arranging and carrying out of the arrest and deportation of the accused so as to give him no opportunity to prove before the governor of the surrendering state that he is not a fugitive from justice does not violate the provision of the Constitution and the laws of Congress enacted thereunder with reference to extradition proceedings.

The logical inference to be gleaned from these decisions is that an individual, who is within a state's jurisdiction and who is either convicted of a crime or pleads guilty before a state court after having been fairly apprised of the charges against him, and after a fair trial in accordance with constitutional procedural safeguards, has no right to sue for damages because of the alleged failure of that state to acquire custody through a particular formalized process of extradition. *Ker v. Illinois, supra; Frisbie v. Collins, supra; Hines v. Guthrie, supra.* The same rationale is illustrated in the ruling that state prisoners could not maintain a civil rights action for damages based upon the alleged constitutional infirmity of his arrest, search of his apartment, and seizure of property which was introduced at a trial which resulted in his conviction. *Alexander v.*

Emerson, supra. The assertion that if one is illegally extradited he loses the opportunity to contest the regularity of the proceedings is without merit because whatever defenses the alleged fugitive can raise in the asylum state can be raised as a defense in his trial or in a habeas corpus proceeding in the demanding state. No rights of the fugitive are infringed nor is there a greater deprivation of liberty when an individual is extradited without formal proceedings. Furthermore, the respondent cannot realistically argue that his position was significantly prejudiced in light of his subsequent guilty plea.

The alleged violation of Georgia's Extradition statute, which grants a fugitive a hearing prior to removal does not confer upon the respondent a federally protected right which the Federal Civil Rights Act was designed to protect. A violation of state law is not sufficient to give rise to a cause of action under 42 U. S. C. § 1983 because the rights created by a state statute are not federally protected ones. *Hamilton v. Chaffin,* 506 F. 2d 904 (C. A. Miss. 1975); *Ouzts v. Maryland National Ins. Co.,* 470 F. 2d 790, reh. 505 F. 2d 547 (9th Cir. 1972); *Croy v. Skinner,* 410 F. Supp. 117 (D. C. Ga. 1976); *Taylor v. Nichols,* 409 F. Supp. 927 (D. C. Kan. 1976); *Saunders v. Cahill,* 359 F. Supp. 79 (1973). Furthermore, the petitioner should not be subjected to a civil rights suit for the violation of a foreign state statute. If any violation of Georgia law occurred it was perpetrated by the Georgia officer who released the respondent into the custody of the petitioner.

In light of the above discussion, it is the petitioner's position that the Court of Appeals' decision is erroneous and that the requested writ should be issued.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

DANIEL R. McLEOD,
Attorney General,
State of South Carolina,

EMMET H. CLAIR,
Senior Assistant Attorney General,
Of Counsel,

RICHARD D. BYBEE,
Staff Attorney,
Of Counsel,
Post Office Box 11549,
Columbia, South Carolina 29211,
Attorneys for Petitioner.

December 19, 1977.

APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1597

WILLIAM JOHN WIRTH, APPELLANT,

versus

R. R. SURLES, OFFICER, STATE HIGHWAY PATROL, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT COLUMBIA. SOL BLATT, JR., DISTRICT JUDGE.

Argued June 9, 1977 Decided Sept. 22, 1977

Before BRYAN, Senior Circuit Judge, RUSSELL and HALL, Circuit Judges.

ROBERT E. MCCORMACK, Third Year Law Student (MICHAEL E. GELTNER, Appellate Litigation Clinic, Georgetown University Law Center on brief) for Appellant; H. BRENT FORTSON, Assistant Attorney General (DANIEL R. MCLEOD, Attorney General, TREVA G. ASHWORTH, Assistant Attorney General and RICHARD D. BYBEE, Legal Assistant on brief) for Appellee.

HALL, Circuit Judge:

The plaintiff, William John Wirth, filed a *pro se* civil rights action pursuant to 42 U. S. C. § 1983 seeking damages from R. R. Surles, an officer of the South Carolina Highway

Patrol, for allegedly taking Mr. Wirth into custody, forcibly removing him from the State of Georgia and returning him to the State of South Carolina without first having Wirth extradited. The district court, *sua sponte,* dismissed the complaint holding that Surles' conduct was not actionable under 42 U. S. C. § 1983. We disagree, and we reverse and remand this case for further proceedings.

I

FACTS

On February 18, 1974, the Allendale, South Carolina, Police Department issued an all-points bulletin for a suspect in the armed robbery of a local store. One hour after the robbery, two unidentified Georgia highway police officers arrested Mr. Wirth in the State of Georgia for the armed robbery. The two officers took Mr. Wirth to the Georgia welcome station. Officer R. R. Surles, of the South Carolina Highway Patrol, crossed into Georgia, took Mr. Wirth into custody, and transported him into South Carolina without any extradition proceedings. Mr. Wirth pleaded guilty to the charge of armed robbery and was sentenced.

II

DISMISSAL OF PLAINTIFF'S § 1983 ACTION

A civil rights claim based on 42 U. S. C. § 1983 should not be dismissed for failure to state a claim upon which relief can be granted, unless it appears beyond doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U. S. 41, 45-46 (1957); *Johnson v. Mueller,* 415 F. 2d 354, 355 (4th Cir. 1969). Viewed in this context, there are two essential elements which must be proven by plaintiff in order to state a claim in a § 1983 suit. First, the conduct complained of must have been done by some person acting under color of law; and second, such conduct must have subjected the complainant to the deprivation of rights, privileges, or immunities secured to him by the Constitution and the laws of the United States. *Monroe v. Pape,* 365 U. S. 167 (1961); *Johnson v. Mueller, supra.* at 355.

A.

UNDER COLOR OF LAW

Because the district court found no deprivation of rights in this case, the issue of whether Officer Surles was acting under the color of law was not reached below. Nevertheless, this court concludes that when a highway patrolman crosses a state line to obtain custody of a suspect and returns the suspect without extradition to the state which the officer serves, he is acting under color of law. *Brzozowski v. Randall,* 281 F. Supp. 306, 311 (E. D. Pa. 1968). This rule follows even when the challenged acts constitute an abuse of the authority conveyed upon an officer. *Scheuer v. Rhodes,* 416 U. S. 232, 243 (1974).

B.

DEPRIVATION OF RIGHTS

The central issue in this case is whether the plaintiff possessed any rights, privileges, or immunities secured to him by the Constitution and the laws of the United States which were infringed by his capture and removal to South Carolina without extradition proceedings.

The district court held that the plaintiff possessed no such right, privilege, or immunity, relying upon one line of authority which supports such a holding. *See, e. g., Hines v. Guthrey,* 342 F. Supp. 594 (W. D. Va. 1972); *Johnson v. Buie,* 312 F. Supp. 1349 (W. D. Mo. 1970); *Crawford v. Lydick,* 179 F. Supp. 211 (W. D. Mich. 1959). The rationale for these decisions is found in the following language of *Biddinger v. Commissioner,* 245 U. S. 128, 132-33, 138 (1917), which speaks to the purpose of the interstate extradition provision of the Constitution:

> The language was not used to express the law of extradition as usually prevailing among independent nations but to provide a summary executive proceeding by the use of which the closely associated states of the Union could promptly aid one another in bringing to trial persons accused of crime by preventing their finding in one state an asylum against the processes of

> justice of another. . . . Such a provision was necessary to prevent the very general requirement of the state Constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than a defense for the innocent, which it was intended to be. Its design was and is, in effect, to eliminate, for this purpose, the boundaries of states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land. Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally to effect their important purpose. . . .

From this language, several courts have found that "the constitutional provision for the interstate extradition of fugitives and the federal statutes enacted thereunder were designed to benefit the states, not to benefit fugitives." *E. g., Hines v. Guthrey,* 342 F. Supp. 594, 595 (W. D. Va. 1972).

Although we recognize the limited nature of the extradition proceeding, this court does not believe that the fugitive possessed no rights which would conceivably give rise to an action under 42 U. S. C. § 1983. Accordingly, we specifically disagree with *Hines* insofar as it holds otherwise.

Before the governor of the asylum state releases a fugitive to the custody of the demanding state, he must make the following two findings:

> *First,* that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the state making the demand; and, *second,* that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand.

Roberts v. Reilly, 116 U. S. 80, 95 (1885).

There can be no doubt that "the first of these prerequisites is a question of law, and is always open, upon the face of the papers, to judicial inquiry, on an application for a discharge under a writ of *habeas corpus.*" *Roberts, supra.* at 95. Therefore, in addition to the fact that "the [extradition] statute is one involving the substantial rights of citizens, and its essential elements must be strictly followed," *United States v. Meyering,* 75 F. 2d 716, 717 (7th Cir. 1935), the rights are open to inquiry through habeas corpus. Simply stated, "[t]he alleged fugitive has a right not to be imprisoned or dealt with by the states in disregard of those safeguards provided by the Constitution and statutes of the United States." *Meyering, supra.* at 717.

Additionally, the laws of Georgia provide the fugitive with many rights which are to be observed before extradition. *See* Ga. Code Ann. §§ 44-401 to 44-429 (1974). Under § 44-411, a fugitive is entitled to a hearing before a magistrate who must inform him of the demand made for his extradition, that he has a right to counsel, and that he has a right to test the legality of his arrest by petition for a writ of habeas corpus. A denial of these same rights was found by the tenth circuit to be actionable under 42 U. S. C. § 1983. *Sanders v. Conine,* 506 F. 2d 530 (10th Cir. 1974). "The requirement that a person arrested as a fugitive be advised of his right to counsel and be taken before a court patently benefits the prisoner, not the state." *Sanders, supra.* at 532, *citing Pierson v. Grant,* 357 F. Supp. 397, 398 (N. D. Iowa 1973). We find no merit in the argument that the violation of Georgia's extradition laws does not give rise to a § 1983 suit. Where the violation of state law causes the deprivation of rights protected by the Constitution and statutes of the United States, a cause of action is stated under 42 U. S. C. § 1983. *See Sanders v. Conine,* 506 F. 2d 530, 532 (10th Cir. 1974); *Pierson v. Grant,* 357 F. Supp. 397, 399 (N. D. Iowa 1973).

This court does not believe that law enforcement officials should simply ignore the clear mandates of state and federal extradition laws in the apprehension and transportation of fugitives. While recognizing that failure to comply with state or federal extradition laws does not con-

stitute a defense to a criminal prosecution, *Ker v. Illinois,* 119 U. S. 436 (1886), we nevertheless hold that a complaint alleging the arrest and transportation of a fugitive without extradition proceedings does create a cause of action pursuant to 42 U. S. C. § 1983. Settled authority supports this proposition, which we hold to be the better view. *Sanders v. Conine,* 506 F. 2d 530 (10th Cir. 1974); *Picking v. Pennsylvania Railroad Company,* 151 F. 2d 240 (3rd Cir. 1945); *Pierson v. Grant,* 357 F. Supp. 397 (N. D. Iowa 1973); *Brzozowski v. Randall,* 281 F. Supp. 306 (E. D. Pa. 1968).

Finally, one unpublished opinion deserves commentary since it was cited by defense counsel as possibly controlling the present appeal. In *Mabery v. Garrison,* No. 77-1048 (4th Cir. Oct. 11, 1976), this court affirmed the denial of a cause of action pursuant to 42 U. S. C. § 1983 brought by a plaintiff who alleged a violation of the extradition laws. The New York application for custody was approved by the Governor of North Carolina, and the plaintiff, Mabery, was surrendered to the New York authorities. However, the plaintiff had previously begun a challenge of his impending extradition, petitioning the state court for a writ of habeas corpus and a temporary restraining order prohibiting his removal from the state prior to a hearing. On the day of Mabery's removal, Warden Garrison received a show cause order which had been entered that day by the state court, but Mabery was already en route to New York.

Mabery sought damages from the warden and from the New York district attorney. This court held that the district court properly dismissed the suit as to both plaintiffs, noting first, that the New York district attorney could not be served with process, and second, that it was mandatory for the North Carolina warden to surrender Mabery to New York authorities when the Governor of North Carolina approved New York's request for custody.

The dismissal of the suit as to the warden in the *Mabery* case reflects the good-faith defense which can be raised in a § 1983 suit.[1] *Pierson v. Ray,* 386 U. S. 547, 555-56 (1967).

[1] From the abbreviated record before this court, it is impossible to determine the availability of this good-faith defense. On remand, this defense, if applicable, and others, may be raised by the defendant, Surles.

After this court approved the dismissal of the action in the *Mabery* case on the grounds outlined above, it discussed issues similar to those raised in the instant appeal. Because *Mabery* was decided on other grounds, the discussion of the similar issues in *Mabery* is not controlling here.

Accordingly, the case is reversed and remanded for further proceedings.

REVERSED AND REMANDED.

RUSSELL, CIRCUIT JUDGE, dissenting:

I dissent from the majority opinion for the reasons stated in *Hines v. Guthrey* (W. D. Va. 1972) 342 F. Supp. 594, and *United States Ex Rel. Bryant* (D. Del. 1976) 423 F. Supp. 471.

I might add that the majority opinion cites in support of its conclusions *Pierson v. Grant* (N. D. Iowa 1973) 357 F. Supp. 397. However, on appeal the court of appeals did not, as I read the opinion,[1] affirm the portion of the district court's decision cited by the majority in support of its conclusion. On the contrary, the opinion of the appellate court merely recognizes the conflict in the decisions on the point.[2]

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December, 1977, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Michael E. Geltner, Esquire, Georgetown University Law Center, 600 New Jersey Avenue, N. W., Washington, D. C. 20001, Counsel for the Respondent.

. . . . . .

DANIEL R. McLEOD,
Post Office Box 11549,
Columbia, South Carolina 29211,
Attorney for Petitioner.

[1] *Pierson v. Grant* (8th Cir. 1975) 527 F. (2d) 161.
[2] *See* Note 5 at 163, 527 F. (2d).